**Mast Advertising & Publishing, Inc. *and* Communications Workers of America, AFL–CIO *and* Mary C. Bergstrom.** Cases 17–CA–14719, 17–CA–14719–2, and 17–CA–14893

August 27, 1991

## DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND RAUDABAUGH

On March 27, 1991, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Union filed a brief in opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified, and to adopt the recommended Order.[2]

The judge applied the dual motivation test of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), to conclude that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending employee Mary C. Bergstrom. Thus, he found that the General Counsel made a prima facie case that Bergstrom's protected activity was a motivating factor in the Respondent's decision to suspend her,[3] and that the Respondent failed to rebut such case by demonstrating that it would have suspended Bergstrom even in the absence of her protected activities. We agree with the judge's finding that the Respondent violated the Act by suspending Bergstrom, but disagree that *Wright Line* is the correct standard to apply to this case.

The events leading to the suspension may be summarized as follows. On March 2, 1990, employee Burns asked Bergstrom to accompany him as a witness to the office of Benefits Manager Brewer from whom he planned to request paid leave for a visit to his physician for treatment of a work-related back injury. Brewer admittedly allowed Bergstrom into the meeting for this purpose. Shortly after the discussion between Burns and Brewer began, Bergstrom interjected a comment about her own worker's compensation experience.[4] Brewer reminded her that she was there as a witness and that she should remain quiet. Some moments later, when it became apparent that Burns' request for leave would be denied, Bergstrom again interjected, accusing Brewer of not caring from a personal or professional standpoint if Burns ruptured a disk and died on the job. At this, Brewer became red-faced and visibly upset, and ordered Bergstrom to leave her office. At first, Bergstrom refused, but after Brewer threatened to call security and have her escorted out, Bergstrom left.

Brewer reported the incident later that day (Friday) to her immediate superior, Fitzmaurice, who decided that Bergstrom's ''extreme insubordination'' and ''gross misconduct'' warranted a 3-day suspension, coupled with probation for a period of 90 days. When Bergstrom arrived the following Monday morning for work, she was informed of the discipline, and told to report back to work on Thursday.

The judge found, and we agree, that Bergstrom was engaged in protected activity when she went with Burns to see Brewer. In that context, which we find tantamount to the presentation of a grievance, two employees were working together at the same time and place toward a common goal related to their terms and conditions of employment, activity which is clearly protected by Section 7. It is well settled that an ''employee's right to engage in concerted activity may permit some leeway for impulsive behavior which must be balanced against the employer's right to maintain order and respect.'' *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965), enfg. 148 NLRB 1379 (1964). We find that Bergstrom's conduct in interjecting comments—impertinent as they might have been—into Burns' discussion with Brewer was not so flagrant and egregious as to cost her the Act's protection.[5] We note in this regard that Brewer granted Bergstrom permission to be present, and that Bergstrom ultimately obeyed Brewer's command to leave her office. The offensive element in her conduct consisted only of interrupting the discussion twice and making remarks which Brewer found personally insulting. We conclude that, in the course of Burns' presentation of what amounted to a grievance concerning the denial of permission to see a doctor, Bergstrom's conduct presented no threat to the Respondent's mainte-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also asserts that the judge's findings are a result of bias against the Respondent's witnesses. After careful examination of the record, we are satisfied that this allegation is without merit.

[2] We have modified the notice to comport with the language of the judge's recommended Order.

[3] The judge relied on evidence that the Respondent was aware of Bergstrom's activities in support of the Union, that she had received two previous warnings which were discriminatorily motivated, that the Respondent relied on those warnings in imposing the suspension, and that Bergstrom was engaged in protected concerted activity by acting as a witness for employee Burns during the meeting at which her conduct was alleged by management to warrant the suspension.

[4] Bergstrom commented that when she was on worker's compensation, she went to see as many doctors as she wanted, and that Burns could do the same.

[5] See *Hawaiian Hauling Service*, 219 NLRB 765, 766 (1975).

nance of order, respect, or discipline.[6] It was merely her way, however artless, of asserting a right to medical treatment which she believed from her own experience, was being unfairly denied to her coworker.

The Respondent admits it was this conduct which led it to suspend Bergstrom. Accordingly, we find that the Respondent violated Section 8(a)(1) by suspending Bergstrom and placing her on probationary status for 90 days, because it did so as a consequence of her protected concerted activity in advocating Burns' rights to management.[7]

### AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 7.

''7. By imposing a 3-day suspension on employee Mary C. Bergstrom and by placing her on probationary status for a period of 90 days, the Respondent engaged in conduct violative of Section 8(a)(1) of the Act.''

### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Mast Advertising & Publishing, Inc., Overland Park, Kansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

### APPENDIX

NOTICE TO EMPLOYEEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT suspend, place on probation, issue written warnings, or otherwise discipline employees because they engage in union or other protected concerted activities.

WE WILL NOT issue verbal warnings to employees that they should restrict union activities to their lunch or break periods when no rule prohibiting such conduct during worktime is in effect.

WE WILL NOT threaten our employees with reduced benefits if they aid or support a union.

WE WILL NOT maintain in effect in our employee handbook a rule which mandates the confidentiality of our employees' rates of pay.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind any rule which mandates that employees keep confidential any information regarding their rates of pay.

WE WILL make employee Mary C. Bergstrom whole, with interest, for any wages lost as a result of our unlawful suspension of her.

WE WILL rescind and expunge from our files any references to the August 25, 1989 verbal warning, the November 2, 1989 written warning, and the suspension and placement on probationary status in March 1990 of Bergstrom and notify her, in writing, that this has been done and that evidence of this discipline will not be used as a basis for any future personnel action against her.

## MAST ADVERTISING & PUBLISHING, INC.

*Naomi L. Stuart, Esq.*, for the General Counsel.
*J. Curtis Nettels, Esq.*, of Overland Park, Kansas, for the Respondent.
*William M. Franz, Esq.* and *Maureen M. Franz, Esq. (Franz & Franz, P.C.)*, of St. Louis, Missouri, for the Communications Workers of America.

### DECISION

#### STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The original and first amended unfair labor practice charges in Case 17–CA–14719 were filed by Communications Workers of America, AFL–CIO (the Union), on November 7 and December 21, 1989, respectively; the original and first amended unfair labor practice charges in Case 17–CA–14719–2 were filed by the Union on November 13 and December 21, 1989, respectively; and the original and first amended unfair labor practice charges in Case 17–CA–14893 were filed by Mary C. Bergstrom, an individual, on March 5 and 7, 1990, respectively. Based on the unfair labor practice charges, the Regional Director for Region 17 of the National Labor Relations Board (the Board), issued an order consolidating cases and a consolidated complaint on April 5, 1990. The consolidated complaint alleges that Mast Advertising & Publishing, Inc. (Respondent), engaged in, and is engaging in certain unfair labor practices violative of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent timely filed an answer, essentially denying the commission of the alleged unfair labor practices. The matter was scheduled for hearing and tried before me on May 17, 1990, in Mission, Kansas. All parties were afforded the opportunity to examine and cross-examine witnesses, to offer any relevant evidence into the record, to argue their legal positions orally, and to file posthearing briefs. Briefs were filed by all parties and have been carefully considered by me. Accordingly, based on the entire record, including the posthearing briefs and my observation of the demeanor of the several witnesses, I make the following

[6] Cf. *Marico Enterprises*, 283 NLRB 726, 732 (1987) (employee's unprovoked extreme and abusive outbursts, obscene gestures, and insubordination on the shop floor egregious and disruptive enough to warrant discharge).

[7] We find it unnecessary to decide whether the suspension also violated Sec. 8(a)(3) of the Act. See *Dougherty Lumber Co.*, 299 NLRB 295 fn. 1 (1990); *Postal Service*, 250 NLRB 4, 6 (1980).

## FINDINGS OF FACT

### I. JURISDICTION

At all times material, Respondent, a corporation, has maintained an office and place of business in Overland Park, Kansas, and has been engaged in the business of publishing telephone directories. In the normal course and conduct of the business operations at its Overland Park, Kansas facility, Respondent annually sells and ships goods and products valued in excess of $50,000 directly to customers located outside the State of Kansas. Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. LABOR ORGANIZATION

Respondent admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### III. ISSUES

The consolidated complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by issuing an oral warning on August 25, 1989, and a written warning on November 2, 1989, to employee Mary C. Bergstrom and that Respondent further violated Section 8(a)(1) and (3) of the Act by giving her a 3-day disciplinary suspension on March 5, 1990, and by placing her on 90-day probationary status. As to the warning notices, Respondent argues that such were not coercive or threatening and that each was de minimis in nature and effect, and, as to the suspension of Bergstrom and placing her on probationary status, Respondent contends that such was not unlawfully motivated and was based on her own disruptive behavior. The consolidated complaint next alleges that Respondent violated Section 8(a)(1) of the Act by threatening employees with loss of benefits if they aided or selected the Union as their bargaining representative. Respondent denied the commission of the allegation. Finally, the consolidated complaint alleges that Respondent violated Section 8(a)(1) of the Act by maintaining a provision in its employee handbook, demanding that employees keep confidential information regarding their rates of pay. Respondent also denied that the provision was violative of the Act.

### IV. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. *The Facts*

Respondent, a wholly-owned subsidiary of Southwestern Bell, is engaged in the business of printing telephone directories for telephone companies and has an office and business facility located in Overland Park, Kansas. Respondent's president is Ron Kennedy; the vice president of finance and administration and chief financial officer is Woodrow E. Williams; the director of Respondent's human resources department is Adrian Fitzmaurice; Patti Brewer is the manager for benefits policy administration; and Owen Ware is the manager for properties and facilities.[1] The record establishes that a union organizing campaign amongst Respondent's production employees commenced on June 15, 1989, when Delbert Johnson, an International staff representative for the Union, met with two employees. Johnson arranged for another meeting with interested employees and, a few days later, met with a group of five or six individuals, including Mary C. Bergstrom, who works for Respondent as a duplicating clerk in the mailroom. Later, in August, an employee organizing committee was established, with members soliciting for the Union and distributing authorization cards. There is no dispute that Bergstrom was involved in the organizational campaign from its inception or that she engaged in the distribution of authorization cards, and the parties stipulated that, commencing in June 1989, Bergstrom ''publicly revealed herself to be a staunch Union partisan and one of its principal organizers on the pending election proceeding.'' In this regard, having obtained enough cards for a sufficient showing of interest, on October 18, 1989, the Union filed a petition for a representation election in a unit encompassing all of Respondent's hourly employees, with Region 17 of the Board, and a representation hearing was scheduled for November 3, 1989. One of the issues at the hearing was to be the status of asserted confidential employees and their inclusion or exclusion from the bargaining unit, and there is no dispute that Bergstrom was one of the Union's sources of information on this issue.[2]

According to the consolidated complaint, one of the alleged unfair labor practices occurred during the period of the Union's initial organizing campaign and two occurred during the time period between the filing of the election petition and the representation hearing. As to the first allegation, Bergstrom testified that she reported for work on August 25 and, in addition to her normal duties, was assigned by Owen Ware, the facilities manager, to substitute for another employee whose job was to stock the women's restrooms with toilet paper, paper towels, and other supplies. That afternoon, according to the Charging Party, she was ordered to report to Owen Ware's office at approximately 2:30. She arrived at his office, and, with no one else present, the supervisor ''told me that someone had approached him and told him that I was talking about the Union in the restroom and that I was to restrict my soliciting for union activities to lunch and breaks.'' Bergstrom replied that she had been working at the time, that she had merely answered a question, that whatever was said had not interfered with her work, and that it was not a lengthy conversation. To this, Ware repeated that she was to restrict soliciting for the Union to her lunches and breaks. Bergstrom added that her meeting with Ware lasted ''maybe five minutes'' and that he said nothing about their conversation constituting any sort of discipline.[3] Concerning the subject of this conversation, the parties stipulated that Respondent has never maintained a no-solicitation rule in effect at the Overland Park facility, and there is no dispute—

[1] Respondent admits that each of the above-mentioned individuals is a supervisor within the meaning of Sec. 2(11) of the Act and its agent within the meaning of Sec. 2(13) of the Act.

[2] There is no dispute that Bergstrom was subpoenaed by the Union to appear as a witness at the representation hearing. She received the subpoena on November 1 at approximately 12:15 p.m. and immediately showed it to Owen Ware, who, as of that date, was her immediate supervisor.

[3] While Ware apparently was prohibiting Bergstrom from engaging in prounion activities during worktime, there is evidence that Respondent tolerated antiunion activities during worktime. Thus, employee Tania Eagleson testified, without contradiction, that, on November 16, 1989, she observed another employee placing antiunion handbills on the desks in her work area during worktime and in the presence of a supervisor. Also, Bergstrom observed two mailroom employees, during worktime, cutting out antiunion logos with the mailroom supervisor observing and saying nothing.

Respondent did call Owen Ware to testify with regard to this allegation nor did it offer any other evidence.

and several employees, including Bergstrom, Donna McKenzie, Helene Requinton, and Tania Eagleson, testified—that Respondent has no rules prohibiting talking in the restrooms or while working. Finally, on this allegation, the record discloses the existence of only one prohibited subject of employee discussion—wages.[4]

The next allegation of the consolidated complaint concerns an incident which occurred on October 31, 1989. There is no dispute that, on this date, Patti Brewer, who is the benefits and policy manager for Respondent and who reports to Adrian Fitzmaurice, the director of Respondent's human resources department, held a series of 12 meetings with bargaining unit employees in order to explain the implementation of a change in the employee savings plan, which involved adoption of the Southwestern Bell salaried employee savings plan. The first of these meetings occurred at 8:30 that morning in an employee training room and lasted no more than 70 minutes. Present were approximately 30 employees from various white pages and yellow pages departments, the records department, and data entry clerks and the departmental supervisors. Donna McKenzie, who was employed as a lead clerk in the yellow pages production department and who had been a leading proponent of the Union amongst the employees, testified that Brewer conducted the entire meeting and announced, at the outset, that Respondent was in the process of changing the employees' savings plan from what was currently in effect to the Southwestern Bell salaried employee plan. Utilizing a slide presentation, Brewer explained ''all the technicalities'' of the new savings plan, stating that, pursuant to its terms, Respondent would match 80 percent of what an employee saved and that this should be contrasted to the Southwestern Bell nonsalaried employee plan, which provided for only a 60-percent employer match. After her presentation, Brewer asked for employee questions. Lavon Hawkins, who was seated in the front row of employees and who, under the existing plan, as a result of her company seniority, was then receiving a 100-percent savings match, asked if she would continue to receive the above matching amount. Brewer replied, no, because Respondent felt it would be more fair to all employees to have an across-the-board 80-percent match and added, ''. . . but, if we go union, then we'll go with the non-salaried plan.'' According to McKenzie, Brewer added ''. . . that the company would not give us as good a benefits if we went union.'' During cross-examination, McKenzie admitted that, based on conversations with representatives of the Union, she was sensitive to any suggestion of loss of benefits because of the Union, that the purpose of the meeting was to explain the new savings plan to the employees, and that, had no questions been asked, Brewer would not have made the comments attributed to her.

Employee Helene Requinton, a yellow pages production clerk and a union adherent from the outset of the campaign, corroborated McKenzie as to Brewer's initial presentation of the hourly employees' new savings plan, including that she compared the Southwestern Bell salaried employees' plan, under which Respondent's hourly employees would be covered and which provided for an 80-percent employer match, to the nonsalaried employee plan, which provided for only a 60-percent employer match. According to this witness, after a slide presentation illustrating investment opportunities, Brewer asked for questions, and Lavon Hawkins asked how the new plan would affect the employer savings match she was then receiving. Brewer responded that, for the majority of hourly employees, this new plan was a better one and, after moving close to Hawkins who was in the front row and lowering her voice, added ''but when the Union comes in, we'll probably only get 60%. . . .'' Requinton, who further testified that she was sitting in the row behind Hawkins and no more than 5 feet from the latter, stated that she thought Brewer's comment was strange as the latter mentioned the Union in connection with what the employees would receive, and, inasmuch as she believed all the assembled employees should hear what Brewer said, she asked Brewer to ''reiterate what she had said.'' To this, Brewer replied, ''we're going to probably have to go to a contract and we don't know what kind of savings plan you'll get, you'll probably go with the . . . 60%.'' Requinton added that she understood the latter percentage figure to mean the nonsalaried employee savings plan. During cross-examination, Requinton could not recall Brewer saying that the company would not give us good benefits if we went union but denied that her question to Brewer was ''when we become union, will we continue to participate in the salaried plan?'' Further, while conceding that she understood Brewer's answer to her as meaning that Respondent did not know what the terms of any bargaining agreement with the Union would be, Requinton added that she also understood the answer to be that ''if we go . . . union . . . we probably would only get the non-salaried plan because management would not go for anything higher.''

Employee Tania Eagleson, a white pages line data operator, testified that, after Brewer made her presentation about the new hourly employee savings plan, including a slide presentation, she accepted ''general questions about the plan.'' Lavon Hawkins asked a question about the company match as she was then receiving 100 percent. Brewer replied that every employee would receive an 80-percent match ''and this was going to be a good thing for most of the people because there weren't that many long-term employees and it was just a sacrifice that they were going to have to make for everybody else. And then . . . she just blurted out that, if the Union comes in . . . the Company match would only be 60%.'' Eagleson continued, saying that Requinton asked Brewer to reiterate, asking if she meant that if the Union comes in, we will not be getting 80 percent, and ''Patti said, yes,'' adding ''that the Company wouldn't be so generous.'' During cross-examination, the witness stated that Brewer's reply to Hawkins was unconnected to the question and ''unusual,'' and she could not recall whether, in her initial presentation, Brewer had mentioned that the Southwestern Bell nonsalaried employee savings plan match was a 60-percent employer match.

[4] Respondent admits that its employee handbook contains the following language, prohibiting employee discussion of their rates of pay:

> Salary administration guidelines, formally titled the Grade Level Compensation Program, have been established to assure that each employee's pay is reviewed on a regular basis, that Mast's pay levels are, and will remain competitive with pay levels for comparable positions in other companies, and that our employees are equitably paid in recognition of individual work performance. Your rate of pay is a private arrangement between you and the Company. It must be kept confidential.

It is alleged in the consolidated complaint that this handbook provision is violative of the Act.

As did the employee witnesses, Patti Brewer testified that the initial portion of her first employee meeting on October 31, 1989, consisted of her informing the employees of their new savings plan and, utilizing printed and visual aids, explaining it in detail. Thereupon, she asked for any employee questions, and after Lavon Hawkins, Helene Requinton ''asked me a question that said when we go union, will we have this plan. . . . My response to Helene was, if we go union, I don't know if we'll have this plan, as all decisions like that have not yet been made.'' Denying that she earlier had mentioned anything about a 60-percent match, Brewer continued, stating that this was not raised until her reply to Hawkins' question, to which she responded that Respondent had chosen an 80-percent match for everyone. To this, Hawkins complained that she was losing 20 percent of her savings under the new savings plan; Brewer agreed, saying that anyone currently at the 100-percent match level or at the 50-percent or 60-percent levels would be moved to the 80-percent match level regardless of tenure. This, according to Brewer, prompted Requinton's question and her reply included information that the nonsalaried employee plan for Southwestern Bell, which is contained in a ''bargained contract,'' has a 60-percent match. Brewer specifically denied saying there would be fewer benefits if the Union came in or the Company would be less generous if the Union came in but conceded that Lavon Hawkins' question had nothing to do with the Union.

Two of Respondent's supervisors testified as to what occurred at this October 31 meeting. Carol Jones, the manager of the white and yellow pages production departments, stated that she could not remember Brewer saying that Respondent would not give us good benefits if we went union. During cross-examination, she agreed that Brewer's answer to Hawkins was directed to the latter and that Brewer's answer to Requinton was ''that we would have to negotiate for our benefits if there was a union.'' Genene Vaughn, the supervisor of yellow pages production, said that she heard everything said by Brewer at the meeting and denied hearing her say there would be fewer benefits or a reduced company match if the Union came in.

The final consolidated complaint allegation, involving conduct prior to the representation case hearing on November 3, 1989, concerns an incident which occurred on the day before the above-scheduled hearing date and which again involved the Charging Party Bergstrom. She testified, without contradiction, that, at 9:40 a.m. on November 2, she took her normal morning break and went to a smoking room, located on the first floor of Respondent's facility. A few minutes after the Charging Party entered the room, employee Diane Snyder, who works as an administrative assistant for Respondent and whose status as an alleged confidential employee and whose inclusion or exclusion from the bargaining unit would be litigated the next day, entered. Bergstrom, who was, as stated above, a union source for information on this issue, began asking Snyder questions about her job, including the difference between a branch secretary and an administrative assistant, and requested a copy of Snyder's job description. Snyder answered Bergstrom's questions but was unsure if she was authorized to give the latter a copy of the job description. Bergstrom's break period ended, and she returned to work. That afternoon, at approximately 3:30, Ricardo Villegas, the mailroom supervisor, informed Bergstrom that Owen Ware wanted to meet with them in his office. After Bergstrom and Villegas reported to Ware's office, the latter said to Bergstrom that he had a written warning for her and proceeded to read it to her, word by word. The warning concerned the Charging Party's conversation with Snyder earlier that day, and, when Ware finished, Bergstrom said that she did not understand the problem as they both were on breaktime and as she saw nothing wrong with her request for the job description. Ware did not respond, and there is no evidence of any Respondent rule, prohibiting the disclosure of such information. Bergstrom subsequently received a copy of the warning notice, General Counsel's Exhibit 4, and it reads as follows:

> It was reported to me this morning you were requesting information from another Mast employee that exceeds the ethical boundaries for this organizing effort. At 9:00 this morning you asked Diane Snyder for a copy of her position description. You stated to Ms. Snyder that Cynthia Ruthman had given you information regarding her position description. However, Ms. Ruthman denies that she talked with you about this matter.
>
> Ms. Snyder had concerns about your request so she discussed it with her manager, Teresa Hamlett. Ms. Hamlett expressed her concerns to Human Resources about her employees being approached during their scheduled work hours about information related to the organizing effort. Another concern was the potential unsettling nature of these inquiries to the other department employees.
>
> As a copy clerk, it is unacceptable practice that you ask other employees about or request copies of their position descriptions. This type of activity or information does not fall within your job description.
>
> This type of activity requires a written warning because you were first verbally warned on 8/25/89 about talking to other employees regarding organizing efforts during non-scheduled break times for yourself or other employees.
>
> This incident goes beyond the guidelines of the organizing effort. Any future occurrence will result in the appropriate disciplinary action.[5]

As scheduled, the representation hearing occurred on November 3, 1989. Bergstrom was present pursuant to her subpoena but was not called as a witness. Subsequently, the Regional Director for Region 17 issued a decision on the bargaining unit issues; the Board granted review; and, as of the date of the hearing, no final decision had been issued. Accordingly, as of March 2, 1990, the petitioned-for representation election had not yet been held. On that date, Bergstrom took her normal lunchbreak, which concluded at 11:45 a.m. and resumed her job duties. Shortly before noon, maintenance employee Rich Burns approached her in the document copying center, which adjoins the mailroom. The record re-

[5] Bergstrom testified, without contradiction, that employees in the mailroom have a ''flexible'' morning breaktime because of their job duties, and there is no contention that she was not in the midst of an authorized break when she spoke to Snyder on November 2.

Ware's reference in this written warning that his conversation with Bergstrom on August 25 constituted a verbal warning was the first indication to the latter that any discipline attached to the incident on that date.

veals that Burns had sustained a back injury in mid-December 1989 and, as a result, had been off work for 6 weeks until receiving a work release in early February. However, he continued to experience pain from the injury, and, earlier that morning, he had met twice with Patti Brewer about seeing a doctor.[6]

According to the Charging Party Bergstrom, Burns explained his problem about obtaining EWP time in order to see his personal physician regarding his back pain and requested that she accompany him to Brewer's office and act as a witness while he renewed his request in the above regard.[7] She agreed, told another mailroom employee where she was going, and went with Burns to Brewer's office. They arrived at the human resources area shortly before noon, were advised that Brewer was speaking on the telephone, and waited for her to finish her conversation. A few minutes later, Brewer ushered Burns into her office, and Bergstrom followed. The latter testified that Brewer asked her why she was there, and ''I told her that Rick had asked me to go up there with him as a witness.'' Brewer replied ''Okay,'' shut the office door, and sat down. Brewer, Bergstrom, and Burns were the only people in the office, and, Bergstrom further testified, Burns began speaking, explaining his problem to Respondent's agent. Brewer responded that Burns' personal physician was ''unauthorized'' and that the Company did not feel it was an emergency situation as the workmen's compensation doctor said he was in no pain, and they would follow what he said. At that point, Bergstrom interjected, saying that when she had been on workmen's compensation, she had been to nine doctors and that, as long as authorized, he could see as many doctors as he wanted. Brewer replied that ''she was speaking to Rick and that I was just there as a witness and, if I couldn't be quiet . . . she'd have to ask me to leave.'' Burns and Brewer continued talking about doctors, his request for time off, his back pain, and his dissatisfaction with what she was telling him about possibly arranging an appointment with the company doctor for that day. Bergstrom again interrupted, saying that she was ''confused'' about what Brewer was saying and that ''you mean . . . if he went to another doctor and . . . that doctor . . . told him that he had a ruptured disk and if he turned wrong that disk could rupture and kill him . . . you wouldn't care personally or professionally whether he died on company property or not.'' At that comment, according to Bergstrom, Brewer became ''very upset,'' walked over to the office door, and said Bergstrom should leave, ''and I left.'' As she departed, the Charging Party turned to Burns and suggested that he find another witness. Bergstrom added that, while leaving the human resources department area, she passed by her supervisor's office, which is ''maybe'' 5 feet from Brewer's, and that Ricardo Villegas stopped her and asked some questions about office supplies. After a few minutes, she left the area and returned to work. As to the conversation with Brewer, conceding that the latter was ''upset,'' Bergstrom denied that they had been yelling at each other or that she uttered any profanity and said the entire conversation lasted no longer than 10 or 15 minutes. During cross-examination, Bergstrom denied that any policy existed about leaving her work area during worktime but conceded being upset but only with regard to the treatment of Burns. Stating that she made just ''two comments'' during the meeting, Bergstrom denied that her conduct disrupted the meeting, that she was agitated or loud, that she refused twice to leave the office, and that she yelled back into the office as she left, ''That's bullshit, Patti.''

With regard to the aforementioned meeting, Rich Burns testified that Bergstrom entered Brewer's office with him but could not recall if Brewer shut the door or left it open. Concerning Bergstrom's presence, he recalled Brewer asking what Bergstrom was doing there and, after the latter responded that she was there as a witness, Brewer said ''that was fine.'' According to Burns, he began the meeting by renewing his request for ''the half EWP day to go see my personal doctor.'' Brewer again denied the request as it was not an emergency and as the company doctor had released him to work. As to what Bergstrom said during the meeting, Burns stated that she made two comments. First, ''she said she went and seen as many doctors as she wanted to and I could do the same.'' Brewer's response was that she should be quiet as she was just a witness. Then, after Brewer again denied his request to visit his own doctor on company time, Bergstrom accused Brewer of not caring ''from a company standpoint or a personal standpoint that I could rupture a disk right there and die.'' Thereupon, Brewer ''turned red in her face'' and asked Bergstrom to leave. Bergstrom refused, saying she was there as a witness for Burns. Brewer stood, walked part way to the door but returned to the desk, sat down, picked up the telephone, and said to Bergstrom she would have to get security to escort her out. After again saying, no, Bergstrom arose and left the room. Moments later, according to Burns, he heard Bergstrom speaking to Ricardo Villegas who was ''probably 20 feet from the door.'' As to the conversation, Burns denied that Bergstrom yelled at Brewer, used obscenities, said ''bullshit,'' or interrupted Brewer. Further, Burns stated that an employee did not require permission from a supervisor to leave his work area and that he was not disciplined for being in Brewer's office without permission. Finally, Burns testified that, on two earlier occasions when speaking to management about his back injury, his sister, who is also an employee of Respondent, had been present as a witness and had been allowed to participate in the conversation.

Patti Brewer testified that the noon meeting with Burns was her third meeting with him on March 2 regarding his desire to see his personal physician about his injured back. According to her, she was speaking on the telephone when Burns entered her office, with Bergstrom following. Brewer states that she told Bergstrom that they could speak later as she was busy, but the employee said she was with Burns. Brewer said the meeting was only between Burns and her-

[6] According to Burns, he met with Brewer at 8:20 a.m. and requested half an ''earned with pay day'' (EWP day) in order to go to see his own doctor as he was in pain, but Brewer refused as ''they didn't feel it was an emergency.'' Later in the morning, he telephoned Brewer, and she advised him that she had arranged a 1 p.m. appointment with the Company's doctor. Burns went to her office in the human resources department area and repeated his request to see his own doctor on EWP time. Again, Brewer refused his request. During cross-examination, Burns said that he understood that he could visit his own doctor on his own time but not on company time. Denying that Burns ever stated that he was in any pain during either of these two meetings, Brewer testified that, while the former had requested EWP time to see his own doctor that day, Burns had merely indicated unhappiness with being released for work at that time.

[7] Bergstrom testified that Burns was aware that she had also once been on workmen's compensation leave due to a back injury and that she knew something about how the system worked.

self; Bergstrom responded ''I'm here as Rick's witness''; and I said, ''okay.'' Bergstrom then shut the door, and Burns began speaking, saying the company doctor was unavailable, he was in pain, and he could not wait until the doctor was available. Brewer started to reply, but Bergstrom interrupted and ''started talking about her worker's compensation incident.'' Brewer stopped her, repeating that the meeting was only with Burns and telling the latter that she would try to arrange an early appointment with the company doctor. Once again, according to Brewer, Bergstrom interrupted, saying ''Patti, that's bullshit.'' At that, Brewer repeated that Bergstrom was not involved in the meeting; the latter replied that the Company was trying ''to screw'' Burns and did not care if he died. Thereupon, Brewer told Bergstrom to be quiet and, if not, to ''please leave.'' When Bergstrom refused, Brewer stated her request more forcefully—''there's the door, leave.'' Paying no attention, Bergstrom ''continued saying bullshit, this company's trying to screw you, no one cares.'' Finally, Brewer testified, she walked from her desk to the office door and said to Bergstrom ''if you don't leave, I will call Security to get you escorted out.'' Thereupon, Brewer opened the door, and Bergstrom ''proceeded out.'' Describing the Charging Party as ''out of control,'' Brewer said of her own mental state, ''I was appalled. I was shocked.'' She further agreed to being red-faced over Bergstrom's behavior. Concluding her direct testimony as to this incident, Brewer stated that, after the Charging Party departed, she and Burns continued speaking, with her contacting the company doctor and arranging an early appointment for Burns that day. During cross-examination, Brewer said that the entire incident lasted no longer than 10 or 15 minutes, that Bergstrom ''was dominating'' what was said, that she was unable to speak to Burns in such circumstances, that ''I asked her repeatedly to leave at least four times,'' and that it took Bergstrom, at least, 2 minutes to leave her office.[8]

Respondent called two witnesses in corroboration of Brewer's version of the incident. Margaret Smart, a personnel recruiter for Respondent, has an office in the human resources department area and situated three offices from that of Brewer. She testified that, at approximately noon, she observed Burns and Bergstrom in the reception area and, 3 or 4 minutes later, ''I heard Patti from my office repeatedly saying leave my office.'' Then, after a pause, she heard Brewer say ''if you do not leave my office, I'm going to have to call Security to escort you out.'' Next, she heard Bergstrom ''yelling this is ridiculous, this company is screwed, and she was yelling this at a high level of sound.'' According to Smart, believing that a ''safety issue'' was involved, she left her own office, walked over to Brewer's, ''peeked'' inside where Burns was seated and Brewer was standing beside her desk, and observed Bergstrom, standing outside Brewer's office, beside a file cabinet, ''and yelling this company is screwed, this is ridiculous.'' Inasmuch as no one appeared to be hurt, Smart returned to her office. A few minutes later, ''I heard [Bergstrom] saying to somebody I can't believe this, she won't let me in there. . . . I can't believe this.'' Smart looked out of her office and observed Bergstrom speaking to Ricardo Villegas just inside the latter's office. Moments later, Bergstrom walked away from Villegas and was ''just kind of hell-bent for the door and exited.'' Moments later, Burns left Brewer's office, and, then, Brewer came out and immediately went into Joan Nicely's office, saying ''I can't believe what just happened.'' During cross-examination, Smart said she heard nothing from Bergstrom until Brewer asked her to leave. She added that the file cabinet, next to which Bergstrom stood, is located near Villegas' office; that the latter's office is next to that of Brewer and shares a common wall; that all the offices in that area are open as the walls do not reach the ceiling; and that ''I can hear anything if doors are open and people are loud enough.''

Joan Nicely, the manager of the compensation and organizational department, testified that, on March 2, as she was taking a telephone message note to Ricardo Villegas' office, she passed by Patti Brewer's office. The door, which had been shut, suddenly opened, and Bergstrom came out, saying in a loud voice, ''that's bullshit, Patti.'' During cross-examination, Nicely, whose own office is two away from Brewer's, said that, notwithstanding having been in the open area, she did not hear Brewer demand that anyone leave her office. Further, she did not hear Bergstrom say anything after her above comment and noticed that the Charging Party immediately left, walking in the opposite direction from Ricardo Villegas' office, to which Nicely was walking with the telephone message. Reaching it, Nicely observed that the door was open and that Villegas was not there.[9]

During her testimony on cross-examination, Bergstrom denied saying to a security guard, outside the human resources department, immediately after the incident, that the personnel people were a ''bunch of fuckers.'' Contradicting the Charging Party, Howard McDonald, who works as a security guard at Respondent's facility pursuant to a subcontracting arrangement, testified that Bergstrom exited from the human resources area a few minutes after noon on March 2, appeared to be ''irritable'' and ''agitated,'' and said, as she passed the witness, ''Those fuckers, they don't care about Rick. Something like that.'' Further, during cross-examination, Bergstrom could not recall, later that afternoon, in the presence of Cindy Habrock, calling Owen Ware a son-of-a-bitch. Habrock, who is employed as the administrative assistant to Respondent's president, Ron Kennedy, testified that, while waiting for an elevator on the fifth floor of the facility during the afternoon of March 2, she heard Bergstrom say ''that Owen Ware was a son-of-a-bitch and that he wouldn't allow Rick to take a half EWP day to go to the doctor.''

There is no dispute that, as a result of the incident in Patti Brewer's office on March 2, 1990, the Charging Party Bergstrom was given a 3-day disciplinary suspension and placed on probation for a period of 90 days. The decision to discipline her was made by Adrian Fitzmaurice, the executive director of Respondent's human resources department. He testified that, on March 2, he returned to the plant, from a business trip, at approximately 3:30 p.m. and was immediately informed of a ''serious incident,'' involving Patti Brewer, which had occurred in her office. Fitzmaurice went to her office, and Brewer reported in ''some detail'' as to what happened. Later that evening, after consulting with

[8] Brewer conceded that she had no objection to Bergstrom being present, during the conversation with Burns, as a witness.

[9] Ricardo Villegas was not called as a witness by Respondent assertedly because he has no recollection of the events of that day.

Owen Ware and Woodrow Williams, Fitzmaurice concluded that Bergstrom's actions, in Brewer's office, constituted ''an extremely serious incident of employee misconduct,'' which warranted a suspension in order to permit further investigation.[10] On Monday, March 5, 1990, Bergstrom reported to work, was informed of the suspension by a security guard, and, thereafter, met with Fitzmaurice in the latter's office. According to the Charging Party, the former told her ''that they were suspending me for . . . being Rick's witness.'' Fitzmaurice did not deny Bergstrom's testimony and testified that he informed Bergstrom the suspension period would be used to investigate a very serious incident that had occurred and, after meeting with Bergstrom, he spoke to Nicely, Smart, and, once again, Brewer. Conceding that he never received from either Burns or Bergstrom their versions of the March 2 incident, Fitzmaurice further testified that his final decision to discipline the Charging Party with a suspension and a probation period was based solely on his interviews of Smart, Nicely, and Brewer and consultations with Ware and Williams, both of whom were not witnesses to what occurred.

The record establishes that General Counsel's Exhibit 2, an ''inter-office memo'' dated March 6, 1990, and assertedly from Brewer to Fitzmaurice, sets forth Respondent's rationale for the discipline of Bergstrom. The document reads as follows:

> *Background*
>
> I have been dealing frequently with Rick Burns regarding his work related accident. Early the morning of March 2, 1990 (8:20 a.m.), I met with Rick and his manager Owen Ware to explain the Company's procedure on using an authorized worker's compensation doctor (this meeting was necessary as Rick felt he could take time off from work at his discretion to see any doctor, not just the authorized doctor). Later in the morning, at approximately 11:00 a.m. I again met with Rick, with Owen present, to discuss once again the worker's compensation procedure. Rick at the later meeting wanted time off work to see an unauthorized doctor as he was in pain. I advised Rick that he would need to use EWP or vacation for that usage. In addition, I instructed Rick to give his authorized doctor, Dr. Humphrey, a call as he may have specific instructions for Rick to assist with the pain. Rick agreed to give Dr. Humphrey a call.
>
> *Meeting*
>
> At ll:55 a.m. Rick Burns stopped by my office to give me an update on contacting Dr. Humphrey. As he entered my office, Cathy Bergstrom followed him in. I told Cathy that I had a meeting with Rick and would see her after the meeting. Cathy shut the door, sat down and responded that she needed to be there, ignoring my comment. I then told her again that this was a meeting between me and Rick. Cathy said she was Rick's witness. I said OK. Rick began telling me how he had made contact with Dr. Humphrey's office and Dr. Humphrey could not get back to him until 5:00 p.m. At this time Cathy started addressing how she felt the situation should be handled. I then told her that this was a conversation between me and Rick. As I continued to speak to Rick, Cathy very vocally started disagreeing with what I was telling Rick. Some of Cathy's comments: ''bullshit, Rick can go to as many doctors as he wants''; ''Patti, you are wrong, when I had my accident I went to nine doctors,'' etc. I then told Cathy to be quiet, this was a conversation between me and Rick. Cathy continued to raise her voice and state her opinions, including ''bullshit, Rick can do what he wants''; ''the Company is trying to screw you Rick''; ''he could fall down and die from a disc problem and that Company wouldn't care,'' etc. I asked Cathy to please leave. She refused to leave so I again asked her to leave. When she wouldn't I stood up and pointed to the door and again asked her to leave. She continued to state her opinions and refuse to leave so I went over to the door, opened it, and told her if she wouldn't leave I would get the security guard to escort her out. At this time Cathy stood up, shouted a few profanities and said she was calling Ron Kennedy because he needed to know what we were doing. She then left, again very loudly stating her opinions as she walked through the department.
>
> I then asked Rick to stay, as he started to follow Cathy out of the office. Rick did stay and I proceeded to apologize to Rick for the distraction and continued with the meeting.
>
> The Company is suspending Cathy Bergstrom for three days and placing her on probation for 90 days for the following reasons:
>
> 1) *Extreme Insubordination*
>
> A. Cathy refused a reasonable request from Patti Brewer when Patti requested that she not interfere or be present at a meeting with Rick Burns (regarding a personal workmen's compensation situation). Cathy shut Patti's door, refused the request, and demanded she stay in Patti's office as a witness for Rick Burns.
>
> B. During the meeting, Cathy rudely interrupted with loud profanity and intimidation. Patti Brewer asked Cathy several times to remain silent, Cathy ignored this request and continued to interrupt.
>
> C. Cathy refused Patti Brewer's request to leave her office. Patti had to ask four or five times for Cathy to leave, finally having to stand and point to the door and then going to the door opening it and having to threaten to ask security to remove Cathy.
>
> 2) *Gross Misconduct*
>
> A. Cathy had no authorization or permission from her management to be away from her work area, or to be in Human Resources for any reason.
>
> B. Cathy has no authorization to interfere with company business. Workmen's compensation insurance is handled by Hartford Insurance company.

[10] Patti Brewer testified that, immediately after the incident, she wrote down her recollection of what had occurred and that, later Fitzmaurice requested that she submit to him a written report of Bergstrom's behavior. What she recorded after the incident comprised her subsequent report to Fitzmaurice and, as will be discussed infra, has become the basis for Respondent's discipline of Bergstrom.

3) *Profane and vulgar language*

A. Cathy used profane and loud language during this incident that's unacceptable in this work environment.

B. Subsequently, I found that Cathy had called Owen Ware, our Facilities Manager, a ''son of a bitch,'' and the employees in Human Resources ''fuckers.''

Patti Brewer testified that, while she did not prepare the above document, what is found beneath the headings ''background'' and ''meeting'' is a verbatim reproduction of her written report of the March 2 Bergstrom incident, which she submitted to Fitzmaurice. The latter testified that he prepared the remainder of the document and that, while ''I didn't put equal weight on each one,'' the listed reasons constitute all that he relied on in disciplining the Charging Party. He continued, stating that ''the central core of the whole thing was gross misconduct, inappropriate behavior.'' Finally, asked about Bergstrom's August 25 verbal warning and her November 2 written warning, Fitzmaurice conceded ''that was factor I considered. . . . One of many factors.''[11]

B. *Analysis*

Initially, with regard to the legality of Respondent's employee handbook provision, relating to the confidentiality of wage rate information, I note that, traditionally, the Board has found such restrictions to be unlawful, notwithstanding the presence or absence of penalties for their breach, as ''. . . they restrain employees in the exercise of their rights to engage in concerted activities by interfering with free discussion concerning the critical issue of wages.'' *Electronic Data Systems*, 278 NLRB 125, 130 (1986); *W. R. Grace Co.*, 240 NLRB 813, 816 (1979). Herein, quite obviously, by terming information, regarding rates of pay, ''private'' and ''confidential,'' Respondent meant nothing less than employee discussion of said subject was prohibited. Moreover, Respondent has failed to establish any ''substantial and legitimate business justification'' for its policy of confidentiality. *L. G. Williams Oil Co.*, 285 NLRB 418 (1987); *International Business Machines Corp.*, 265 NLRB 638 (1982). In these circumstances, Respondent's handbook provision must be found violative of Section 8(a)(1) of the Act. *Apparatus Service*, 296 NLRB 581 (1989); *Electronic Data Systems*, supra.

Turning to Patti Brewer's meeting with employees on October 31, 1989, and the allegation that, during the meeting, concerning a new employee savings plan, she threatened employees with loss of benefits if they aided or assisted the Union, given the disparity in the accounts of what was said, credibility resolutions are mandated. In this regard, while Donna McKenzie, an ardent supporter of the Union and one admittedly sensitive to any hint or suggestion of possible loss of benefits due to the Union, asserted that Brewer warned that employees would receive the less desirable Southwestern Bell nonsalaried employee savings plan and would not be given as good a benefits if they selected the Union, her testimony was uncorroborated, and I place no reliance on what must be perceived as a biased and distorted account of Brewer's comments. However, employees Helene Requinton and Tania Eagleson both impressed me with their candor and the straightforward nature of their respective testimony. Thus, both women candidly recalled that Brewer told the assembled employees that the new savings plan would be the Southwestern Bell salaried employees plan, which included an 80-percent employer match, and that, in response to a question posed by Lavon Hawkins and in a low voice, Brewer warned that if the Union came in, they would only receive a 60-percent match. Further, both women recalled that Requinton asked a followup question and that Brewer confirmed her answer to Hawkins. In contrast to Requinton and Eagleson, Brewer appeared to be a most disingenuous witness throughout her testimony, one not worthy of belief, and I do not credit her testimony as to her asserted responses to either Hawkins or Requinton. In this regard, I do not believe that Brewer framed her responses in terms of collective bargaining. Thus, her own testimony, on this point, was vague and inconsistent, and, during cross-examination on this issue, Requinton was certain that the plain meaning of what Brewer said was that the Southwestern Bell nonsalaried employees' savings plan would be a benefits limit if the employees selected the Union rather than referring to the matter as a bargainable issue.[12] I credit the more candid Requinton and, based on the foregoing, and the record as a whole, I am convinced that Brewer's response to Lavon Hawkins, reiterated to Helene Requinton, was nothing less than an obvious threat of reduced benefits if the employees selected the Union as their bargaining representative and was, thus, violative of Section 8(a)(1) of the Act.

The remaining allegations of the consolidated complaint involve Mary C. Bergstrom. Initially, concerning the verbal warning issued to her on August 25, 1989, there is no dispute that Respondent did not maintain a no-solicitation rule in effect at the time and that, as a result of a conversation in a restroom while Bergstrom was working, Owen Ware called the Charging Party to his office and informed her that she was to restrict her soliciting for the Union to her lunches and break periods. The right of employees to communicate with each other concerning the desirability of organizing is one which is protected by Section 7 of the Act. *Foley-Wismer & Becker*, 263 NLRB 793, 797 (1982). Further, it is a longstanding tenet of Board law that, when an employer has failed to adopt and publish a valid rule regulating union activity during worktime, discipline for that reason will be upheld only when the employer demonstrates that it acted in response to an actual interference with or disruption of work. *Trico Industries*, 283 NLRB 848, 852 (1987); *Foley-Wismer*, supra. Herein, Respondent has proffered no business justification for imposition of this unpublished rule on Bergstrom nor offered any evidence that the Charging Party's conduct caused a disruption of work. In these circumstances, noting Respondent's knowledge of Bergstrom's union activities, the absence of any rule prohibiting employees from talking while they worked, and the fact that Respondent tolerated antiunion activity during worktime, I am compelled to find that, by issuing a verbal warning to Bergstrom on August 25, 1989, Respondent unlawfully dis-

[11] Fitzmaurice also conceded that he had no knowledge of the statement of security guard McDonald at the time he decided to discipline Bergstrom and that, therefore, reason 3(b) was not relied on for his decision.

[12] I place no reliance on the testimony of either of Respondent's supervisors, Jones or Vaughn. Neither impressed me with her veracity nor did either testify in as much detail as did Requinton and Eagleson. Further, it appeared that the testimony of each was designed to buttress the mendacious testimony of Brewer and, therefore, cannot be relied on.

criminated against her in violation of Section 8(a)(1) and (3) of the Act. *Trico Industries*, supra; *Greensboro News Co*., 272 NLRB 135 (1985).[13]

Regarding the November 2, 1989 written warning issued to Mary C. Bergstrom, there is no dispute that such involved her request that Diane Snyder, whose status as an alleged confidential employee and whose inclusion or exclusion from the bargaining unit was to be litigated at the representation case hearing the next day, provide the Charging Party with a copy of her job description. The warning itself asserted that Bergstrom's request ''exceeds the ethical boundaries for this organizing effort''; stated that her activity constituted ''unacceptable practice'' which ''does not fall within your job description''; and that ''this incident goes beyond the guidelines of the organizing effort''; and mentioned the above August 25 ''verbal'' warning as the reason for this written warning. As above, there is no contention that Respondent had in effect at that time any rule, prohibiting the disclosure of the requested information. Two inferences are justified from the foregoing. First, Respondent linked Bergstrom's request to her union activities, and, as is evident from the August 25 verbal warning, Respondent was hardly reticent in interfering with her protected concerted activities. Next, given the facts that Respondent was aware that Bergstrom was scheduled to be a witness at the hearing the next day and that the status of Snyder would be litigated, the inference is warranted that Respondent's purpose was to limit the information available to the Union at the hearing. Although Respondent offered no evidence in support of its contention that the warning was not unlawful, to the extent that one may argue that the requested information was confidential, there is no evidence that job descriptions are considered ''private business records'' or kept in confidential files, and the fact that the issue was to be litigated in a public forum the next day militates against such a finding. *Roadway Express*, 271 NLRB 1238, 1239 (1984). Further, the Board has long held that employees are protected in merely requesting, as opposed to actually coming into possession of, assertedly confidential material. *Ridgely Mfg. Co*., 207 NLRB 193, 197 (1973). Accordingly, based on the linkage to Bergstrom's union activity and to the prior, discriminatory verbal warning, on the lack of any evidence as to the confidential or private nature of the requested document, and on Respondent's demonstrable aversion to Bergstrom's union activity, the conclusion is warranted that, by issuing the November 2, 1989 written warning notice to Bergstrom, Respondent discriminated against her in violation of Section 8(a)(1) and (3) of the Act. *Ridgely Mfg. Co*., supra.

Turning to the most serious and factually complex of the alleged unfair labor practices, involving Bergstrom, her 3-day suspension, and subsequent placement on probationary status by Respondent, there is no dispute that not only was the Charging Party fervently involved in the Union's organizing campaign but also Respondent was well aware of her activities. While counsel for the General Counsel contends that Respondent's above-described March 1990 discipline of Bergstrom was motivated, in part, by the discriminatory warnings of August 25 and November 2, 1989, and by her participation as a witness during the March 2 conversation between Patti Brewer and Rick Burns, Respondent asserts that the discipline was as a result of Bergstrom's disruption of that meeting. In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 453 U.S. 989 (1983), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), the Board established a two-part causation test in cases, such as involved, which turn on employer motivation. First, the General Counsel assumes the burden of establishing a prima facie showing that protected activity was a ''motivating factor'' in the employer's decision. On such a showing, a respondent can ''avoid liability'' by demonstrating, as an affirmative defense, that the same action would have taken place even in the absence of the protected conduct. *D & S Leasing*, 299 NLRB 658 (1990); *Seattle Seahawks*, 292 NLRB 899 (1989). The crucial inquiry, in cases such as this, is ''not whether the Respondent *could* have [disciplined the alleged discriminatee] for [her] conduct, but rather whether the Respondent would have done so in the absence of [her] protected activity.'' *Filene's Basement Store*, 299 NLRB 183 (1990).

To a great extent, analysis as to whether Respondent's conduct was violative of the Act depends on a resolution of the credibility of the three participants in that March 2, 1990 meeting—Bergstrom, Burns, and Brewer. As to Brewer, I have discussed my finding that she appeared to be a mendacious witness and should not be credited.[14] Although to a lesser extent than Brewer, Bergstrom also was not a particularly impressive witness. I believe that the Charging Party was dissembling when describing her state of mind both during and immediately after the incident in Brewer's office and as to complying with the supervisor's requests to leave the office and shall credit her testimony only when uncontroverted, as with regard to the August 25 and November 2, 1989 warnings, or where corroborated by documentary evidence or more credible testimony. Without doubt, the most impressive of the three witnesses was Rick Burns. He testified in an entirely candid and truthful manner and adversely to the pecuniary interests of his employer and shall be credited as to what was said in Brewer's office. Based on the foregoing, and the record as a whole, as to this incident, I find that Bergstrom followed Burns and Brewer into the latter's office and Brewer assented to Bergstrom remaining as a witness; that Burns renewed his earlier request to be given half an EWP day in order to visit his personal physician with regard to his back pain; that Bergstrom twice interjected with comments, saying that she had visited as many doctors as she wanted and Burns could do the same and,

[13] Respondent denies the coercive effect of Ware's conduct, arguing that such was de minimis, did not place Bergstrom's job in jeopardy, and constituted a ''tribute'' to her Sec. 7 rights. Given the unfair labor practices found, this particular violation can hardly be deemed de minimis and, as will be seen infra, was one of the underlying factors for her 3-day suspension. In such circumstances, this egregious labor practice stands as an odd ''tribute'' to Bergstrom's protected concerted activities. The same defense is offered as to the allegations involving the November 2 written warning and, for the same reasons, is equally lacking in merit.

[14] I was not impressed with either of the ostensibly corroborative witnesses, Margaret Smart and Joan Nicely, called by Respondent. Thus, I note that they utterly contradicted each other as to the presence of Ricardo Villegas. Further, Smart, who assertedly overheard much of what was said in Brewer's office, contrary to the latter, mentioned nothing about Bergstrom cursing. Finally, despite the fact that Smart, who was in her office which is three offices removed from that of Brewer, assertedly overheard what must have been shouting emanating from the latter's office and Brewer's characterization of Bergstrom as being ''out of control,'' Nicely, who supposedly was in the open area, heard nothing from inside Brewer's office until Bergstrom opened the door. I place no reliance on the testimony of either woman.

after Brewer continued to deny Burns' request, accusing Brewer of not caring if Burns ruptured a disk and died; that Brewer ordered Bergstrom to be quiet after her initial comment and, after her second comment, became angry and asked Bergstrom to leave the office; that, after Bergstrom refused to leave, Brewer threatened to call security in order to escort her out; that, after again refusing, Bergstrom engaged in a conversation with Ricardo Villegas no more than 20 feet from the door to Brewer's office.

As stated above, there is no dispute that Bergstrom engaged in activities in support of the Union's organizing campaign of Respondent's employees and that Respondent was aware of her activities. Moreover, there is record evidence that her 3-day disciplinary suspension and placement on probationary status were motivated by her support for the Union. Thus, Adrian Fitzmaurice admitted that the fact that Bergstrom received a verbal warning on August 25, 1989, and a written warning on November 2, 1989, was a factor in his decision to impose the above discipline, and I have previously concluded that the warnings were discriminatorily motivated and, therefore, violative of Section 8(a)(1) and (3) of the Act. It follows, of course, that the March 1990 suspension and probation were, likewise, at least, in part, unlawfully motivated. Moreover, the record establishes that Bergstrom's presence, as a witness, at the March 2 meeting was a factor in Fitzmaurice's decision to discipline her. Thus, he failed to specifically deny the alleged discriminatee's testimony that, when they met on March 5, he told her that ''they were suspending me for . . . being Rick's witness,'' and, included in General Counsel's Exhibit 2 under the heading ''Gross Misconduct'' is Fitzmaurice's comment, ''[Bergstrom] has no authorization to interfere with company business.'' Given his uncontroverted comment to Bergstrom, Fitzmaurice's quoted statement, I believe, clearly refers to her presence as a witness. While counsel for the General Counsel has not cited, nor can I find, any prior Board decision on this point, there can be no doubt that Bergstrom was engaged in protected concerted activity while acting as the witness for Rick Burns—with Respondent's permission. Thus, it logically follows that, if requesting a witness constitutes a statutorily protected right, acting in such a capacity must, likewise, be privileged. *E. I. Du Pont & Co.*, 289 NLRB 627, 630 fn. 15 (1988). Further, by definition, acting in the capacity of a witness for a fellow employee during a meeting with their employer involves ''two or more employees . . . working together at the same time and place toward a common goal,'' the sine qua non of conduct protected by Section 7 of the Act. *El Gran Combo de Puerto Rico v. NLRB*, 853 F.2d 996, 1002 (1st Cir. 1988). Also, it is well established that the language of Section 7 of the Act is not to be narrowly construed as to the meaning of concerted activity for mutual aid and protection. *NLRB v. City Disposal Services*, 465 U.S. 822, 831 (1984). In these circumstances, I find that the General Counsel has established a prima facie case of unlawful motivation underlying the March 1990 suspension and probation imposed on Bergstrom by Respondent.

Pursuant to the *Wright Line* analytical approach for mixed motive discharge cases, the burden shifted to Respondent to establish that, notwithstanding the existence of the aforementioned unlawful motivation, it would have imposed discipline on the Charging Party. In this regard, while counsel for Respondent described Bergstrom, during the incident, as ''an insubordinate hothead, a fugitive from her work place, and spoiling for a fight with management,'' based on the record as a whole, I do not believe that Respondent would have disciplined Bergstrom absent the prior warnings in her file and her protected concerted activity. At the outset, the credited testimony of Rick Burns establishes that, while she was present during the meeting between the former and Brewer, Bergstrom, at most, twice interrupted the conversation; made a tasteless and, perhaps, insulting comment, which seemingly upset Brewer; and, after initially refusing and being threatened with eviction, reluctantly left Brewer's office. While one may justifiably characterize Bergstrom's conduct as intemperate, and even assuming Brewer was justified in demanding that Bergstrom leave, she hardly appears to have been, in Brewer's words, ''out of control'' or, in counsel's words, a ''fugitive'' or a ''renegade.'' In fact, rather than assertedly establishing her outlandish behavior, Respondent's hyperbole, in portraying Bergstrom in the foregoing unfavorable light, lends further credence to my opinion that her conduct was no worse than described and would not have warranted discipline absent her protected concerted activities.[15]

That this conclusion is correct may best be seen from an analysis of the sophistical rationale for Bergstrom's discipline, as set forth by Fitzmaurice in General Counsel's Exhibit 2. The initial reason (1A) is that the Charging Party refused Brewer's request that she not be present during the March 2 meeting and demanded to remain as a witness. Contrary to Fitzmaurice, even crediting Brewer's version of the meeting confirms that not only did Bergstrom never demand to stay or refuse a request not to be present but also Brewer gave the former permission to remain as a witness.[16] As to the assertions that Bergstrom rudely interrupted with loud profanity and refused four or five requests to leave Brewer's office (reasons 1B, 1C, and 3A), I have previously credited Rick Burns' version of what occurred inside Brewer's office and, therefore, conclude that, while she, in fact, interjected with comments, including a rather tasteless remark, Bergstrom never uttered a curse word and that, at most, Brewer only twice ordered Bergstrom to leave her office. Moreover, regarding the fact that Bergstrom attempted to participate in the discussion by offering her view concerning Burns' right to visit a personal physician, it was uncontroverted that the latter's sister, who is an employee of Respondent, was a witness during earlier meetings between Burns and management officials and participated in the discussion without being disciplined for such involvement. Finally, while stated reason 2A asserts that Bergstrom had no authorization to be away from her work area during the incident, there is no record evidence that a rule, requiring such permission, was in effect at the time, and Burns, who failed to seek prior permission to go to the human resources area, was never disciplined for said failure. Accordingly, taking

[15] While I recognize that whatever was said by Bergstrom was not in the context of collective bargaining or the adjusting of a grievance, I, nevertheless, conclude that her comment, that Brewer did not care if Burns ruptured a disk and died, was not ''so opprobrious'' as to warrant the imposed discipline. *Hawaiian Hauling Service*, 219 NLRB 765, 766 (1975).

[16] Although never explained by Fitzmaurice, stated reason 2B seems to involve Bergstrom's presence as a witness. Noting that Bergstrom clearly had received Brewer's permission to remain as a witness, I have previously stated my conclusion that acting as a witness was a form of protected concerted activity, privileged by Sec. 7 of the Act.

the foregoing factors into consideration and noting that Fitzmaurice conducted his ''inquiry'' into the events of March 2 without obtaining the versions of either Bergstrom or Burns and that he admitted Bergstrom's prior warnings, which, I have concluded, were discriminatorily imposed, formed a basis for his disciplinary decision, I find that Respondent failed to satisfy its burden of establishing that it would have taken the identical action against Bergstrom absent her protected concerted activities and that, using the Charging Party's above-described intemperate conduct as a convenient excuse, Respondent, in fact, imposed the discipline against her because of her conduct in support of the Union and because she acted as a witness for Burns at the March 2 meeting in Patti Brewer's office. In these circumstances, Respondent's act of suspending Bergstrom and placing her on probation was violative of Section 8(a)(1) and (3) of the Act. *CTS Keene, Inc*., 247 NLRB 1016 (1980).

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening its employees with reduced benefits if they aided or supported the Union, Respondent engaged in conduct violative of Section 8(a)(1) of the Act.

4. By maintaining, in effect, an employee handbook provision which mandates the confidentiality of its employees' rates of pay, Respondent engaged in conduct violative of Section 8(a)(1) of the Act.

5. By issuing a verbal warning to employee Mary C. Bergstrom, that she restrict her activities on behalf of the Union to her lunches and break periods, at a time when Respondent did not maintain a rule, prohibiting such conduct during worktime, in effect, Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

6. By issuing a written warning to employee Mary C. Bergstrom because she engaged in conduct in support of the Union, Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

7. By imposing a 3-day suspension on employee Mary C. Bergstrom and by placing her on probationary status for a period of 90 days, Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

8. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that Respondent engaged in serious unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist from such conduct and to take certain affirmative action designed to effectuate the purposes and policies of the Act. With regard to the employee handbook provision which mandates the confidentiality of employees' rates of pay, I shall recommend that Respondent be ordered to remove the provision from the employee handbook. As to the discriminatory discipline, which has been imposed against Mary C. Bergstrom because of her union activities, I shall recommend that Respondent be ordered to rescind such and to remove all references to the verbal warning of August 25, 1989, the written warning of November 2, 1989, and the suspension and the probationary status imposed as a result of the incident of March 2, 1990, from its files; that Respondent be ordered never to use the unlawful acts as a basis for disciplining Bergstrom in the future; and that Respondent be ordered to make Bergstrom whole for any lost earnings as a result of her suspension, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[17] Additionally, I shall recommend that Respondent be ordered to post a notice, setting forth its obligations.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

## ORDER

The Respondent, Mast Advertising & Publishing, Inc., Overland Park, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, placing on probation, issuing written warnings, or otherwise disciplining employees because they engaged in union or other protected concerted activities.

(b) Issuing verbal warnings to employees that they should restrict union activities to their lunches or break periods when no rule, prohibiting such conduct during worktime, was in effect.

(c) Maintaining in effect in its employee handbook a rule, which mandates the confidentiality of its employees' rates of pay.

(d) Threatening its employees with reduced benefits if they aid or support a union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make employee Mary C. Bergstrom whole for any wages lost as a result of her unlawful suspension in the manner set forth under the remedy above.

(b) Rescind and expunge from its files any references to the August 25, 1989 verbal warning, the November 2, 1989 written warning, and the suspension and placement on probationary status in March 1990 of Bergstrom and notify her, in writing, that this has been done and that evidence of the discipline will not be used as a basis for any future personnel action against her.

(c) Remove from its employee handbook the provision which mandates that employees keep confidential any information regarding their rates of pay.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in Overland Park, Kansas, wherever notices to employees are customarily posted copies of the at-

[17] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set forth in the 1986 amendment to 26 U.S.C. § 6621.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

tached notice marked ''Appendix.''[19] Copies of the notice on forms provided by the Regional Director for Region 17, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''